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NO. _____

IN THE
# Supreme Court Of The United States

OCTOBER TERM, 1986

ANNA PICCININ,
Petitioner,
vs.
A.H. ROBINS COMPANY, INCORPORATED, ET AL.,
Respondents

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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65 pp

## QUESTIONS PRESENTED

Piccinin, a citizen of the United Kingdom residing in Italy, filed a tort action in the United States District Court for the Middle District of Alabama ("the Alabama action") against A.H. Robins Company, Incorporated ("Robins" or "Debtor") and The Aetna Casualty & Surety Company ("Aetna"). Subsequent thereto Robins filed a voluntary petition under Chapter 11 in the United States Bankruptcy Court for the Eastern District of Virginia. Piccinin has filed no proof of claim in the bankruptcy proceeding and the time for filing claims has expired.

1. Whether Piccinin may be enjoined from proceeding with her Alabama action against the nonbankrupt joint tort-feasor co-defendant (Aetna) of the Chapter 11 Debtor (Robins) on motion of the Debtor, when Piccinin has filed no

claim in the bankruptcy proceeding and where there has been no evidentiary finding in the bankruptcy proceeding that Piccinin's action against Aetna threatens property of Robins' bankruptcy estate.

2. Whether Piccinin's Alabama action against the co-defendant nonbankrupt joint tort-feasor Aetna may be transferred from the Middle District of Alabama to the Eastern District of Virginia by the District Court in Virginia pursuant to the authority of 28 U.S.C. Sec. 157(b)(5), when Piccinin has filed no claim in the Debtor's Chapter 11 proceeding pending in the Bankruptcy Court for the Eastern District of Virginia.

3. Whether constitutional guaranties of Fifth Amendment due process of law and Seventh Amendment right to trial by jury were denied Piccinin, and/or the

class of plaintiffs she purportedly represents, by the enjoining of her Alabama action against Aetna and by the decision that her action and/or any other similar actions against Aetna may be transferred under 28 U.S.C. Sec. 157(b)(5) to the District Court in Richmond, Virginia.

4. Whether 28 U.S.C. Sec. 157(b)(5) is so vague, ambiguous and indefinite as to be null, void, illegal and unconstitutional, if applied as a venue statute to authorize the transfer of Piccinin's Alabama action, and all other cases against co-defendants of Debtor, pending in state and other district courts, to the district court in which the bankruptcy case is pending (rather than applying the statute to those cases involving only the Debtor and/or in which claims have been filed in the bankruptcy

proceedings), as denying Fifth Amendment due process of law to Piccinin and to all other plaintiffs of the class she purportedly represents, in over 2,400 actions involving co-defendants of the Debtor.

5. Whether the transfer of over 5,000 actions, including 2,400 involving co-defendants of the Debtor, would effectively deny Piccinin and all other plaintiffs the right to jury trial as provided by the Seventh Amendment and as provided by 28 U.S.C. Sec. 1411(a).

## LISTING OF PARTIES

The lead case in the Court of Appeals for the Fourth Circuit was No. 85-2183. In that case, Anna Piccinin was appellant, A.H. Robins Company, Incorporated was appellee, and Aetna Casualty & Surety Company was intervenor/appellee. There were other named defendants in the district court, none of whom filed appeals or briefs in connection with that appeal. That appeal involved the order of the district court entered October 11, 1985, nunc pro tunc October 9, 1985, granting Debtor's motion for preliminary injunction, enjoining Piccinin from proceeding against the co-defendant Aetna in the Alabama action and enjoining Conrad, Mosa and the other plaintiffs from proceeding against Debtor's co-defendants in those plaintiffs' state and federal court actions.

Consolidated as a part of the appeal of the lead case were appeals from the district court's order of November 9, 1985, transferring over 5,000 actions, including Piccinin's Alabama action, to the district court in Richmond, Virginia. Piccinin appealed that order in Case No. 85-2186 in which she was the appellant and A.H. Robins Company, Incorporated was the appellee.

The Committee of Representatives of Dalkon Shield Claimants appealed the transfer order of November 9, 1985, in Case No. 85-2184, in which said Committee were appellants, A.H. Robins Company, Incorporated was appellee, and Aetna Casualty & Surety Company was intervenor/ appellee.

Kathryn Conrad and Luisa and Jack Mosa appealed the transfer order of November 9, 1985, in Case No. 85-2185, in

which Conrad and the Mosas were appellants, and A.H. Robins Company, Incorporated was appellee.

Thus, in view of the four consolidated appeals, i.e., Numbers 85-2183, 85-2184, 85-2185 and 85-2186, the following identified parties are herein named as Respondents, to-wit: A.H. ROBINS COMPANY, INCORPORATED; THE AETNA CASUALTY & SURETY COMPANY; the COMMITTEE OF REPRESENTATIVES OF DALKON SHIELD CLAIMANTS; and KATHRYN CONRAD and LUISA and JACK MOSA. Service of this Petition for Writ of Certiorari will be made upon all of the aforesaid named Respondents even though the principal Respondent is A.H. Robins Company, Incorporated.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

Petitioner, ANNA PICCININ (hereinafter "Piccinin"), prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit affirming in part and remanding with directions orders of the United States District Court for the Eastern District of Virginia, Richmond Division.

## OPINIONS BELOW

The Opinion of the Court of Appeals (Appendix, p. A1) of April 10, 1986, is reported as A.H. Robins Co., Inc. v. Piccinin, 788 F.2d 994 (4th Cir. 1986). The Orders of the District Court entered October 11, 1985, nunc pro tunc October 9, 1985 (Appendix, pp. A123, 140) and November 9, 1985 (Appendix, pp. A142, 145) are not reported.

## JURISDICTION

The judgment of the Court of Appeals was entered April 10, 1986, and Piccinin's petition for rehearing was denied May 14, 1986. (Appendix, pp. A146, 148)

Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

## STATEMENT OF THE CASE

Prior to the filing on August 21, 1985, by Debtor of a voluntary petition

under Chapter 11, Piccinin had her Alabama action pending against Aetna and Debtor as joint tort-feasors and co-conspirators, seeking judgment against defendants, jointly and severally, for compensatory and punitive damages for personal injuries sustained by her as a result of her use of the Dalkon Shield. Her complaint contains allegations of Aetna's involvement in both pre-marketing, marketing and post-marketing periods of the intrauterine device, the Dalkon Shield, to include Aetna's affirmative involvement in the labeling and testing of that device, e.g., Aetna conducting its own investigation and obtaining knowledge from its own engineering, technical and medical service sections; Aetna making affirmative recommendations on labeling, adverse effects or reactions and precautions in connection with

marketing the Dalkon Shield; and Aetna's assumption of a duty to conduct post-marketing surveillance of the Dalkon Shield.

There are numerous other allegations that charge Aetna with independent willful, wanton, intentional, fraudulent, immoral and negligent acts and conduct.

Piccinin's Alabama action against Debtor was subject to the automatic stay of the bankruptcy court. The stay was recognized by Piccinin. She requested the district court in the Alabama action to preserve the status quo as to Debtor and allow her to proceed with discovery against Aetna, without prejudice to Debtor. Hearing was scheduled on that request for October 15, 1985.

On September 25, 1985, Debtor commenced an adversary proceeding in the district court in Virginia by filing a

complaint for declaratory judgment and injunctive relief and a motion for preliminary injunction against Piccinin and seven other defendants, including Kathryn Conrad ("Conrad") and Luisa Mosa and Jack Mosa ("Mosa"). All of the defendants named by Debtor in the Adversary Proceeding were plaintiffs in civil actions against Debtor and co-defendants pending in various state and federal courts outside of Virginia. No co-defendant of Debtor in any of the civil actions was named as a defendant in the Adversary Proceedings.

Summons was issued by the clerk, and service of the complaint, summons and motion for temporary injunction was made on Piccinin by first-class mail to her residence in Italy.

Hearing on Debtor's motion was scheduled October 9, 1985. On that date

and prior to hearing, Piccinin filed her motion to dismiss and supporting brief.

After hearing held on October 9, 1985, the district court entered an order on October 11, 1985, nunc pro tunc October 9, 1985, granting Debtor's motion for preliminary injunction, enjoining Piccinin from proceeding against the co-defendant Aetna in the Alabama action and enjoining the plaintiffs in all of the other proceedings against Debtor's co-defendants from proceeding in those plaintiffs' state and federal court actions and further ruling that the conclusions of law would apply "with equal force to all defendants similarly situated who are brought to the attention of this court." (Appendix, pp. A123, 136) Piccinin appealed from that order.

On October 30, 1985, Debtor filed a motion for determination of trial venue,

identification of cases related to the Chapter 11 case and transfer of over 5,000 cases to the district court in Richmond (the "transfer motion").

On October 31, 1985, the district court entered an order for expedited hearing of the transfer motion, setting a hearing on November 9, 1985. No service of the transfer motion or of the court's order for expedited hearing was made upon any plaintiff, including Piccinin, or upon any co-defendant in the over 5,000 civil actions pending. Service of the transfer motion and the order of expedited hearing was made only upon counsel for the Committee of Representatives of Dalkon Shield Claimants (hereinafter "Claimants' Committee").

Piccinin, without waiving her objections to service of process, jurisdiction over her person and of the

subject matter, and right of appeal, filed a response to Debtor's transfer motion, responding to each paragraph thereof, objecting to the transfer of her Alabama action and alleging the procedures used to be unconstitutional and a denial of due process of law, in that she had had no reasonable notice and opportunity to respond and alleged that the motion seeks to ex parte usurp jurisdiction of the United States District Court for the Middle District of Alabama over not only her claim against the Debtor but also her claim against Aetna.

On November 9, 1985, after hearing, the district court entered an order that all actions based upon personal injury tort or wrongful death claims arising from the use of the Dalkon Shield are proceedings related to the Chapter 11 case over which the district court has

jurisdiction; that all actions related to the Chapter 11 case now pending in any federal district court or subsequently removed to any federal district court during the pendency of the Chapter 11 case be transferred by the clerks of those courts to the district court in Richmond, Virginia; and stayed that order for a period of five days (Appendix, p. A142, 145).

By order entered November 13, 1985, the Court of Appeals for the Fourth Circuit stayed the district court transfer order of November 9, 1985, ordered the appeals of the October 11, 1985 and November 9, 1985, district court orders consolidated for briefing and argument and allowed Aetna to intervene in the appeal. Piccinin and the Claimants' Committee filed respective notices of

appeal on November 13, 1985, of the transfer order.

The Court of Appeals for the Fourth Circuit, by opinion entered April 10, 1986, affirmed the grant of the preliminary injunction, but held that service of notice of the hearing on the motion to fix venue and to transfer, as given only to the Claimants' Committee, did not represent compliance with Bankruptcy Rule 9014 or with due process; that notice to the Claimants' Committee may have been sufficient to permit the issuance of a provisional or conditional order providing for a fixing of venue in the district court sitting in bankruptcy for all the pending Dalkon Shield cases against the Debtor upon giving the claimants individual notice and an opportunity to object and to be heard before the order became final in any case where the plaintiff has

filed an objection; that the order of the district court must be modified to make it crystal clear that the determination of venue therein is conditional, dependent finally and ultimately on a ruling to be made only after notice to all claimants advising them of their right to enter any objections they may have to such a tentative ruling and to submit a motion for abstention in their particular case; and that in order to achieve this modification, remand was made to the district court for further proceedings in accordance with the opinion. The directions as contained in the opinion speak only to matters pertaining to notice to claimants, e.g., fixing time limits for filing of objections by claimants and fixing a day for a hearing on such objections. Absolutely nothing is said in the opinion with reference to co-

defendants of the Debtor, e.g., whether co-defendants are entitled to notice or opportunity to object to transfer.

The opinion suggested that a tentative order might be made final as to any claimant who failed to enter an objection within the prescribed time, and stated:

> We do not presume to suggest rigid guidelines for the district judge to follow when considering objections to the transfer. We believe it important, however, to observe that although there may be distinct advantages of the tort claims being transferred to Richmond, those advantages should be balanced against the disadvantages that may be advanced at the hearing. In that regard, some cases may be fully prepared and ready for state trial. Some cases may require substantial numbers of local witnesses. Claimants may be receiving critical medical, physical or psychological care in a local area which would have to be halted or transferred to Richmond. All of these factors are relevant. Moreover, there are issues of state law that may substantially affect the results in

individual cases. (Appendix, p. A103; 788 F.2d at 1016)

Piccinin timely filed her petition for rehearing and the Court of Appeals denied the petition for rehearing on May 14, 1986 (Appendix, pp. A146, 148).

The basis for federal jurisdiction asserted by the district court in the first instance was 28 U.S.C. Secs. 1334(b)(d) and 1651 and 11 U.S.C. Secs. 105 and 362(a).

The basis for federal jurisdiction asserted by the district court in the transfer motion was 28 U.S.C. Secs. 157(b)(5) and 1334(b) and 11 U.S.C. Sec. 105(a).

The basis for federal jurisdiction of the consolidated appeals to the Court of Appeals for the Fourth Circuit was 28 U.S.C. Secs. 1291 and 1292(a)(1).

## CONSTITUTIONAL PROVISIONS, STATUTES AND BANKRUPTCY RULES INVOLVED

The constitutional provisions involved are the Fifth Amendment due process of law provision and the Seventh Amendment right to jury trial provision.

The Fifth Amendment to the Constitution of the United States is set forth hereinafter.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Seventh Amendment to the Constitution of the United States is set forth hereinafter.

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The statutes involved are 11 U.S.C. Sec. 105(a); 11 U.S.C. Sec. 362(a)(1)(3); 28 U.S.C. Sec. 157(b)(5); 28 U.S.C. Sec. 1334(b)(d); 28 U.S.C. Sec. 1404(a); 28 U.S.C. Sec. 1411(a); 28 U.S.C. Sec. 1412; 28 U.S.C. Sec. 1651(a).

The statutes are set forth hereinafter.

11 U.S.C. Sec. 105(a)

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

11 U.S.C. Sec. 362(a)(1)(3)

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, . . . operates as a stay, applicable to all entities, of--
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

28 U.S.C. Sec. 157(b)(5)

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

28 U.S.C. Sec. 1334(b)(d)

> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.
>
> (d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the estate.

28 U.S.C. Sec. 1404(a)

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. Sec. 1411(a)

> Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal

injury or wrongful death tort claim.

28 U.S.C. Sec. 1412

> A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties.

28 U.S.C. Sec. 1651(a)

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The Bankruptcy Rules involved are B.R. 7004(a)(3), 7012(a) and 9014, set forth hereinafter.

B.R. 7004(a)(3)

> (a) Summons; service; proof of service. Rule 4(a), (b), (d), (e) and (g)-(i) F.R.Civ.P. applies in adversary proceedings. Personal service pursuant to Rule 4(d) F.R.Civ.P. may be made by any person not less than 18 years of age who is not a party and the summons may be delivered by the clerk to any such person.

(3) Service on debtor and others in foreign country. The summons and complaint and all other process except a subpoena may be served as provided in Rule 4(d)(1) and (d)(3) in a foreign country (A) on the debtor, any person required to perform the duties of a debtor, any general partner of a partnership debtor, or any attorney who is a party to a transaction subject to examination under Rule 2017; or (B) on any party to an adversary proceeding to determine or protect rights in property in the custody of the court; or (C) on any person whenever such service is authorized by a federal or state law referred to in Rule 4(d)7) or (e).

B.R. 7012(a)

(a) When presented. If a complaint is duly served, the defendant shall serve an answer within 30 days after the issuance of the summons, except when a different time is prescribed by the court. The court shall prescribe the time for service of the answer when service of a complaint is made by publication or upon a party in a foreign country. . . ."

B.R. 9014

In a contested matter in a case under the Code not otherwise

governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7062, 7064, 7069, and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. A person who desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.

## REASONS FOR GRANTING WRIT

Matters of grave public importance are involved with respect to mass tort litigation involving important questions of federal law which have not been, but should be, settled by this Court.

First reason: This Court has not construed the provisions of 28 U.S.C. Sec. 157(b)(5). This statute has been construed by the district court below and on appeal by the Court of Appeals for the Fourth Circuit as a bankruptcy venue statute that allows a district court in the district in which a bankruptcy case is pending to order the transfer of cases pending in state and district courts throughout the nation into the district court in the district in which the bankruptcy case is pending. Thus, the district court below ordered the transfer into the district court below of over

5,000 civil actions of which 2,400 involved actions in which there were defendants other than the debtor. While the court of appeals held that the plaintiffs in the eight cases, including the case of your Petitioner, were denied due process because of the absence of proper notice and opportunity for hearing, the Fourth Circuit has left in place the district court's transfer order as a conditional order, to become final after the giving of notice to claimants and an opportunity to object. Thus, each of the 5,000 actions, including the 2,400 actions involving co-defendants, are now in the limbo state of quasi-transfer. No action has been taken by the district court below in response to the Fourth Circuit's directions. As a practical matter, it would take several years for the district court below to grant a

hearing and hear objections if urged in each of the individual cases. Moreover, upon transfer of the cases to one district court for jury trial, many years would be required for one district court to try the cases.

The decision of the Fourth Circuit in this case creates conflict with the Sixth Circuit case of In re White Motor Credit, 761 F.2d 270 (6th Cir. 1985), which is not addressed in the Fourth Circuit opinion. White says that co-defendants "cannot be transferred out of the jurisdiction they are now in --" (at p. 273,274). The Fourth Circuit Opinion says there was nothing in White "that declared that such action was mandated or even preferred. . ." (Appendix, p. A33, n. 10; 788 F.2d at 1002, n. 10).

Resolution and settlement of the Fourth Circuit Opinion with White is

necessary to prohibit transfer of cases against co-defendants of the Debtor. Otherwise, those co-defendants, including Piccinin, will be deprived of due process of law and right to trial by jury.

Moreover, 28 U.S.C. Sec. 157(b)(5) should be held to be an unconstitutionally vague venue statute, if a construction of that statute is made so as to authorize transfer of cases against co-defendants pending in other state and federal courts, rather than construing the statute to apply solely and exclusively with the liquidation of contingent personal injury tort or wrongful death claims filed in the bankruptcy estate and to allow the trial of those claims for the purpose of liquidation only in the district court in which the bankruptcy case is pending.

The gravity of this need for settled law from this Court is graphically illustrated when this Court considers the magnitude of the expense and inconvenience involved in the transfer of 5,000, or even 2,400, pending actions, including the voluminous records in those cases, many of which have been and are ready for trial, with discovery completed and masses of depositions and discovery documents.

Piccinin, in order to focus directly on the statute here involved, has filed no proof of claim in the bankruptcy proceeding of the Chapter 11 Debtor in Richmond, Virginia. Thus, Piccinin has no claim that requires either estimation or liquidation in the Chapter 11 proceeding by the district court in Richmond, Virginia.

The only reasonable basis for the transfer of the Piccinin action from the United States District Court for the Middle District of Alabama to the United States District Court for the Eastern District of Virginia would be for there to be a decision made by the District Court in the Middle District of Alabama of a need to transfer that case under the provisions of 28 U.S.C. Sec. 1404(a) or under 28 U.S.C. Sec. 1412.

To sanction the construction as placed upon 28 U.S.C. Sec. 157(b)(5) by the district court below and affirmed by the Fourth Circuit involves such an important question of federal law of such great public importance that it should be settled by this Court now and not be delayed for future resolution.

Second reason: Another matter of great public importance involving an

important question of federal law which has not been, but should be, settled by this Court is the question of granting injunctive relief to co-defendant joint tort-feasors under the stay provisions of 11 U.S.C. Sec. 362(a).

There is an apparent conflict between the Piccinin decision by the Fourth Circuit and Williford v. Armstrong World Industries, Inc., 715 F.2d 124 (4th Cir. 1983).

In Williford, the Fourth Circuit held that co-defendant joint tort-feasors cannot avail themselves of the automatic stay provisions of 11 U.S.C. Sec. 362(a); that the clear and unambiguous language provides only for an automatic stay of any judicial proceeding against the debtor; and that the debtor is the only beneficiary of the stay.

Courts of appeals reaching the same result are: Fortier v. Dona Anna Plaza Partners, 747 F.2d 1324, 1330 (10th Cir. 1984); Lynch v. Johns-Manville Sales Corp., 710 F.2d 1194 (6th Cir. 1983); Wedgeworth v. Fibreboard Corp., 706 F.2d 541, 544 (5th Cir. 1983) [The Fourth Circuit held itself to be in accord with this decision. Williford, supra, at 127, n.1]; Austin v. Unarco Industries, Inc., 705 F.2d 1 (1st Cir. 1983), cert. dismissed 463 U.S. 1247 (1983); Pitts v. Unarco Industries, Inc., 698 F.2d 313 (7th Cir. 1983), cert. den'd 464 U.S. 1003 (1983). See also Harville v. Johns-Manville Products Corp., 731 F.2d 775, n.3 (11th Cir. 1984).

This Honorable Court has apparently tacitly agreed, by denying certiorari in some of the above cases, to the validity of those rulings.

Only Debtor requested injunctive relief below. No co-defendant, including Aetna, was made a defendant or respondent. No co-defendant of Debtor joined in the request, including Aetna, thereby indicating that all such co-defendants were aware that such relief was not available to them under the Fourth Circuit's ruling in Williford.

Debtor is entitled to and does have the benefit of the automatic stay. No property of the Debtor's estate is threatened in the Piccinin Alabama action. The continuation of the Alabama action against Aetna cannot possibly impair or impede the Debtor's reorganization. Were Piccinin asking or requesting in the Alabama action that Debtor continue as a party therein, or be subject to discovery therein, then Debtor could

seek relief for itself under the automatic stay available to it.

For the district court below, on motion of Debtor, to grant relief to Aetna not available to Aetna under Williford, and for such relief to be affirmed on appeal by the Fourth Circuit, creates a conflict as to the scope and construction of 11 U.S.C. Sec. 362(a).

Williford held that co-defendant joint tort-feasors were not entitled to even discretionary stay. The Fourth Circuit in Piccinin did not address that conflict in the opinion, since the Fourth Circuit incorrectly states in its opinion: ". . .Williford, supra, Metal Center and Seybolt, discussed supra, are illustrative of situations in which courts have found sufficient grounds to grant a stay under this power." (Appendix, p.

A42; 788 F.2d at 1003) (Emphasis supplied.)

Piccinin's action against Aetna should be allowed to proceed against Aetna on the issue of Aetna's independent liability for its own conduct. There was no finding made by the district court below that Piccinin's action threatened property of the Debtor's estate. Any judgment recovered by Piccinin would operate directly against Aetna and not on the Debtor's insurance assets. Aetna is not in the position of a co-debtor principal of the Debtor. The public interest would be greatly served by allowing Piccinin to proceed against Aetna, for upon establishment of a right to recovery and recovery from Aetna, Piccinin will not deplete Debtor's assets but, to the contrary, will establish

assets other than Debtor's for injured Dalkon Shield victims.

The effect of the preliminary injunction enjoining Piccinin from proceeding against Aetna, both as to Piccinin and the class of plaintiffs she purportedly represents, is to delay her right to jury trial against Aetna in the United States District Court for the Middle District of Alabama for such indefinite period of time as the district court in Richmond, Virginia, decides to leave the injunction in force and effect, conceivably until after the termination of the Debtor's Chapter 11 proceeding, whenever that might be.

This Court should decide this important question of federal law which has not been, but should be, settled dealing with stays from litigation available to co-defendants of a debtor in

a Chapter 11 proceeding, particularly where those co-defendants are not entitled to stays under established case law upon direct application for such relief by such co-defendants.

**ARGUMENT**

1. THE TRANSFER ORDER, EVEN IF CONSIDERED CONDITIONAL, IS CONTRARY TO LAW AND SHOULD BE REVERSED.

As stated in In re White Motor Credit, supra, at 271: "The new Act has a number of conflicting provisions and is confusing to say the least. . . ." That court considered transfer of cases pursuant to 28 U.S.C. Sec. 157(b)(5) and held:

> . . .These sentences from Senator Dole's remarks, plus the fact that section 157(b)(4) of title 28 removes tort cases from mandatory abstention under section 1334(c)(2) but does not remove discretionary abstention under section 1334(c)(1), convinces us that the district court has the authority to

leave tort cases in the courts in which they are pending for liquidation there.

The statute authorizes abstention in the interest of justice or comity. These requirements are more than adequately met in the circumstances. Since there are other defendants in many of the tort cases against White Motor--defendants who cannot be transferred out of the jurisdiction they are now in--the cases will have to be tried twice in different courts if the district court decides to liquidate the individual cases. This is a strong reason for leaving the cases where they are. In addition, plaintiffs and defendants might be faced with inconsistent rulings and verdicts and multiple res judicata problems. . . . (at pp. 273,274) (emphasis supplied).

The Piccinin opinion of the Fourth Circuit holds:

Nor do we find anything in In re White Motor Credit, 761 F.2d 270, 273-4 (6th Cir. 1985), also relied on by the appellants, that lends support to appellants' construction of Sec. 157(b)(5). The extent of the holding in White Motor was that the district court had the

> power under the statute to allow products liability cases to be tried where the claim arose; there was nothing in the opinion, however, that declared that such action was mandated or even preferred. Specifically, there was no statement in the opinion that the district court in which the bankruptcy was pending could not try the claim. Unquestionably the district court in this case had the power under the statute to fix the trial venue in its district for all Dalkon Shield cases. (Appendix, p. A75; 788 F.2d at 1010) (Emphasis supplied.)

The precise conflict now apparent between the Fourth Circuit and the Sixth Circuit is as to cases involving co-defendants of a debtor. Piccinin placed this issue squarely before the Fourth Circuit, both as to the holding in White that the co-defendants in the tort cases cannot be transferred out of the jurisdictions they are now in and as to the legal and constitutional infirmity of 28 U.S.C. Sec. 157(b)(5). She has not filed

a claim in the Debtor's Chapter 11 proceeding. 28 U.S.C. Sec. 157(b)(5) refers therein to "claims" rather than cases or actions pending in other courts. It concerns the venue of bankruptcy claims. It does not govern transfer of cases pending in other courts. Change of venue under the Bankruptcy Code is governed by Sec. 1412 of title 28. In order to invoke that provision, the Debtor must file a motion for change of venue in each district court where a case is pending. Cases pending in state courts would first have to be removed. The court below had no authority to transfer cases pending in other district courts.

There was even less basis for the transfer of causes of action against co-defendants, as was held in In re White Motor Credit, supra, at 274. Causes of

action against parties other than the Debtor are clearly not "claims" in this case. Thus, Sec. 157(b)(5) has no application at all to actions against co-defendants. Again, the proper procedure for the Debtor would be to file in the district court where each case is pending a motion under either Sec. 1412 or Sec. 1404 of title 28.

The Debtor's effort to base the transfer of cases on Sec. 105 of title 11 must fail. On its face, Sec. 105 authorizes only orders necessary to carry out the provisions of "this title." 11 U.S.C. Sec. 105. The "title" referred to is title 11. Section 157(b)(5) is in title 28. Section 105 cannot be used to expand rights or to expand the jurisdiction of the courts. See Johnson v. First National Bank of Montevideo, 719 F.2d 270 (8th Cir. 1983), cert. denied, 465 U.S.

1012 (1984); In re Sutton, 43 B.R. 250 (Bankr.D.Conn. 1984); In re Markee, 31 B.R. 429 (Bankr.D.Idaho 1983).

Moreover, Sec. 105 does not empower a court to do what it is expressly prohibited from doing by statute. In In re Stuart Motel, Inc., 15 B.R. 28 (Bankr. S.D.Fla. 1981), the bankruptcy court refused to issue an injunction pursuant to Sec. 105(a) to prevent a state court clerk from conducting a foreclosure sale after the bankruptcy court had granted relief from stay for the foreclosure action to continue. The bankruptcy court held that its Sec. 105(a) power was "of course, subject to the limitations set forth in 28 U.S.C. Sec. 1481 which states that a Bankruptcy Court may not enjoin another court." 15 B.R. at 30. Similarly, in the present instance, Sec. 105 is

limited by 28 U.S.C. Sec. 1412, which expressly governs transfer of cases.

Piccinin has argued to the Fourth Circuit and asserts to this Honorable Court that 28 U.S.C. Sec. 157(b)(5) is so vague, ambiguous and indefinite as to be null, void, illegal and unconstitutional, if applied to pending cases in state and other district courts, including Piccinin's action, rather than applied to claims filed in the bankruptcy proceeding for trial of those claims solely for the purpose of liquidation, as denying due process of law to the plaintiffs in the various 5,000 actions, including the 2,400 actions involving co-defendants, including Piccinin's Alabama action.

The effect of the transfer of Piccinin's Alabama action, together with over 5,000 cases, including 2,400 cases involving co-defendants, to the district

court in Richmond, Virginia, would be to effectively deny a trial by jury of Piccinin's claim against Aetna and, thus, would be in violation of the Seventh Amendment to the Constitution of the United States and contrary to 28 U.S.C. Sec. 1411(a).

2. INJUNCTIVE STAY RELIEF IN BEHALF OF CO-DEFENDANT AETNA IS CONTRARY TO LAW AND SHOULD NOT BE SANCTIONED.

The district court below found as to the Piccinin claim that ". . .The claim against Aetna is premised on Aetna's own alleged actions and alleged failure to act. . . ." (Appendix, p. A110).

The district court below recognized that Piccinin's action against Aetna was not a threat to any property of the Debtor's estate in that the district court found as a fact that five of the other actions considered did threaten

property of the Debtor's estate but made no such finding as to Piccinin's Alabama action. (Appendix, p. A130)

Piccinin would have to get a judgment against the Debtor to reduce or diminish any insurance fund or pool. She seeks to proceed solely against Aetna on the issue of Aetna's independent liability for its own conduct and any judgment recovered would operate directly against Aetna and not on the Debtor's insurance or any other asset of Debtor's estate. Moreover, Piccinin has filed no claim in the Chapter 11 proceeding against Debtor.

The Fourth Circuit has overlooked or misapprehended these facts as is evident by that court's opinion holding:

> . . . It [the district court] found, as had the Johns-Manville courts, that irreparable harm would be suffered by the debtor and by the defendants since any of these suits against these co-defendants, if successful, would reduce and

> diminish the insurance fund or pool represented in Aetna's policy in favor of Robins and thereby affect the property of the debtor to the detriment of the debtor's creditors as a whole. The likelihood of success by the debtor under these circumstances appeared indisputable. The hardships which would be suffered irreparably by the debtor and by its creditors generally in permitting these plaintiffs to secure as it were a preference in the distribution of the insurance pool herein to which all creditors were entitled, together with the unquestioned public interest in promoting a viable reorganization of the debtor can be said to outweigh any contrary hardship to the plaintiffs. . . (Appendix, pp. A62; 788 F.2d at 1008) (Emphasis supplied).

In re A.J. Mackay Co., 50 B.R. 756 (D.C. 1985), was called to the attention of the Fourth Circuit. Mackay holds:

> Some courts have found that non-bankrupt codebtors can be protected from their creditors if necessary to prevent "pressure" on the bankrupt codebtor. See In re Otero Mills, Inc., 25 B.R. 1018 (D.N.M. 1982), and its numerous progeny. However, this court believes that Otero

Mills and its progeny were wrongly decided. See In re Venture Properties, Inc., 37 B.R. 175, 176 (Bankr. D.N.H. 1984). In a Chapter 11 case, the only properly invoked jurisdiction is that over the debtor himself and his property. To hold that the bankruptcy court also has jurisdiction over anyone that might "pressure" the debtor or over any property that might "assist" the debtor in reorganizing is to expand jurisdiction beyond limit. Jurisdiction exists only over the debtor and his property, and no further. (at p. 762) (Emphasis supplied.)

This court is convinced that stays preventing creditors from proceeding against non-bankrupt codebtors are granted all too often. A bankruptcy court does not have the jurisdiction to grant such a stay simply to "assist" the debtor in reorganizing, or to relieve "pressure" on the debtor. If such a stay is properly within the court's jurisdiction at all, it is only in extraordinary cases where a stay is required to allow the legal process to proceed. The stay can be used only for procedural purposes, not as substantive relief. (at p. 762)

While this court holds that a non-bankrupt codebtor cannot be protected from his creditors through provisions in a confirmed plan, it does not hold that, in extraordinary cases, a non-bankrupt codebtor cannot be protected prior to confirmation of a plan. In order for a beleaguered debtor to prepare a proposed plan of reorganization, it may be necessary to protect the codebtor principals of the debtor from their creditors to allow them time to do the necessary work. This protection must end, however, when the plan is confirmed. If the protection does not end at that point, it is the codebtor who is being protected, not the debtor. (at p. 762) (Emphasis supplied.)

Some courts have identified 11 U.S.C. Sec. 105 as a source of jurisdictional power to stay creditor actions against non-bankrupt codebtors. See, e.g., In re Landmark Air Fund II, 19 B.R. 556, 599 (Bankr.-N.D. Ohio 1982). While that may be true for temporary stays that terminate when a plan is confirmed, it is not true for a stay which is embodied in a confirmed plan or which extends beyond confirmation. A bankruptcy court judgment must be based on either in rem or in personam jurisdiction that has been properly invoked. Section

> 105 does not supplant that requirement. Instead, the broad, rather vague, jurisdictional powers of Sec. 105 are constrained by that fundamental jurisdictional requirement. (at p. 762)

Mackay says that the court believes that In re Otero Mills, Inc., 25 B.R. 1018 (D.N.M. 1982), was wrongly decided. Otero Mills is cited favorably by the Fourth Circuit. (Appendix, pp. A35, 40; 788 F.2d at 1002, 1003) Mackay says that it may be necessary to protect the codebtor principals of the debtor prior to confirmation of a plan, but that the protection must end when the plan is confirmed.

With respect to Piccinin and her action against Aetna, Aetna is not in the position of a codebtor principal and would be entitled to no protection prior to confirmation of a plan.

In order for a district court to exercise jurisdiction to enter any order with respect to Piccinin or Piccinin's Alabama action, there must first be established in that court both jurisdiction of her person and the subject matter. That jurisdiction presently exists only in the United States District Court in Alabama and has not been waived. She has not consented to jurisdiction of her person in Virginia.

In order for a court to exercise in personam jurisdiction over a defendant, the due process clause of the United States Constitution requires that the nonresident defendant have minimum contacts with the jurisdiction. International Shoe Co. v. Washington, 326 U.S. 310 (1945); Hanson v. Denckla, 357 U.S. 235 (1958). To assert in personam jurisdiction based upon a determination

of statutory situs of a res does not comport with the constitutional requirements of due process. Shaffer v. Heitner, 433 U.S. 186 (1977).

Piccinin is a citizen of the United Kingdom, residing in Rome, Italy, whose only contact with the United States is her Alabama action against Aetna. The district court in Virginia exercised in personam jurisdiction over a defendant who has never been to Virginia.

Piccinin was not properly served with process under Bankruptcy Rule 7004, nor did the summons prescribe a time for service of an answer as required by Bankruptcy Rule 7012(a).

Bankruptcy Rule 7004 prescribes the procedures whereby proper service of process, summons and complaint is to be accomplished on any asserted defendant. It was not followed. No effective

process or service of process has been made upon Piccinin. She was not and is not subject to in personam jurisdiction of the court in Virginia.

By enjoining Piccinin from proceeding in her Alabama action against Aetna, she has been denied the right to jury trial guaranteed by the Seventh Amendment to the Constitution.

## CONCLUSION

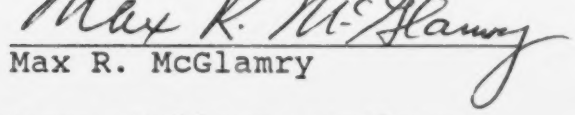
Piccinin respectfully urges this Court to grant her petition for a writ of certiorari and to give direction, in the light of the orders here for review and under the facts and circumstances of the procedures followed, so as to effectively protect injured plaintiffs in mass tort litigation, grant them due process of law and reasonably prompt access to the courts of their choice for jury trials. If the Bankruptcy Act is improperly used

as a vehicle to bring all litigation to the Debtor's doorstep in a Chapter 11 setting at the inconvenience, delay and expense of the injured, then the provisions of that Act must withstand close and strict constitutional scrutiny. Any provision of that Act that denies due process or right to jury trial should be stricken as null, void and unconstitutional. If a Chapter 11 proceeding is workable in mass tort litigation, then the burden should be squarely upon the Debtor seeking such relief to insure at every instance that those who have been injured not be delayed in the redress of their rights nor that the Debtor act on behalf of other co-defendants so as to shelter them or prevent recourse against

those co-defendants for their independent acts.

Respectfully submitted,

C. Neal Pope



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## CERTIFICATE OF SERVICE

I, C. Neal Pope, do hereby certify that I am a member of the Bar of The Supreme Court of the United States. I further certify that I have served the foregoing Petition for Writ of Certiorari upon each Respondent by mailing three copies of the same properly addressed, postage prepaid, to each of the following:

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